No. 4533

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HARTLEY WALKER,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

STERLING CARR,
United States Attorney,

T. J. SHERIDAN,
Asst. United States Attorney,
Attorneys for Defendant in Error.

Neal, Stratford & Kerr, S. F. 49064

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STATEMENT.

This is a writ of error to the District Court of the Northern District of California to reverse a sentence rendered upon conviction for violations of the National Prohibition Act.

On December 8, 1924, an information in one count was presented against defendant, charging that on the 4th day of December, 1924, "at 826 Sonoma Street, Vallejo, in the County of *Sonoma,* in the Northern Division of the Northern District of California and within the jurisdiction of this Court", unlawfully had possession of property designed for the manufacture of liquor intended for use in vio-

lating the National Prohibition Act. At the subsequent trial the court permitted the information to be amended by adding an additional count charging that at the same time "at 826 Sonoma Street, Vallejo, in the County of *Solano,* in the Northern Division of the Northern District of California and within the jurisdiction of this court", the defendant unlawfully maintained a common nuisance in that he manufactured on the premises intoxicating liquor specified.

At the trial the defendant was convicted on both counts and thereupon sentenced that he be imprisoned for the period of one year in the County Jail of Sacramento County and that he pay a fine of $1000.

At the trial C. L. Murr, a Federal Internal Revenue Agent, on the 4th day of December, 1924, went to the defendant's place as described; Agent Hall, accompanying, had a search warrant and went to the front door. Agent Felt and witness went to the back door. In a little addition built onto this house stood defendant and his wife, defendant looking out of a window. He had three stills in the little room he stood in going full blast. The doors were all open and as the agents stepped to the door they could see the stills in full operation. They stepped in, arrested the defendant and found 400 gallons of mash in several barrels, 30 gallons of contraband liquor, 2 of the stills were "hooked" together, giving a double run. A sample of the liquor was produced.

At the close of this witness's testimony, the government requested an opportunity to file another count, omitted through an oversight; the defendant objected. The court stated he didn't wish to try the defendant twice and did permit the government to file another count. Thereupon Agent Felt gave testimony substantially as that of Agent Murr, stating that he saw the stills before they entered the doorway.

Agent Hall testified to the same effect and to the finding of 40 gallons of jackass brandy and the taking of samples of same; said that defendant stated he owned the things. The stills and liquors were put in evidence.

The defendant did not testify, merely producing a witness who testified that he lived in one of the apartments of the Walker flat and did not know a still was being operated, but saw the place where the still was recovered from.

There was no motion for a directed verdict at the close of the government's case (Tr. p. 42), nor at the close of all the evidence (Tr. p. 44). There were no exceptions to the court's charge, nor were there any requests for instructions submitted by the defendant (Tr. p. 46). There is a bill of exceptions in the record appearing on pages 26 to page 47, and containing merely the matters adverted to.

The assignments of error appear at pages 17 to 26 of the Transcript; they are fifteen in number. The

first nine specify in varying language the insufficiency of the information. The tenth specifies that the court erred in admitting evidence and not showing what it was. The eleventh specifies that the court erred in denying a motion to suppress evidence and sets out an alleged Exhibit "A", apparently a copy of a search warrant and affidavit; these documents do not otherwise appear in the transcript. Nor do they constitute a part of the record, not being included in any bill of exceptions. The twelfth and thirteenth assignments specify that the court erred in admitting evidence without setting forth the evidence. The fourteenth and fifteenth merely specify that the court erred in entering judgment.

ARGUMENT.

I.

The information was sufficient as to both counts.

The phraseology made use of in charging the offense set forth in each count of the information is that commonly used and which has been held by this court to be sufficient in the case of

Young vs. U. S., 2727 Fed. 967.

Something is sought to be made of the circumstance that there was a slight error in the description of premises made use of in the first count. The unlawful possession of property was stated to be at 826 Sonoma Street, Vallejo, County of *Sonoma,* and in the Northern Division of the Northern District of

California, the name of the County being erroneously stated as Sonoma when it should have been Solano. But the court will take judicial notice that Vallejo is in Solano County, and that there is no Vallejo in Sonoma County. There would thus be a case for the application of the principle *falsa demonstratio non nocet* if it were a case of an essential description of a tract of land or a particular premises. But here the crime sought to be charged was not that of a nuisance or any crime having reference to a particular locality, but could have been proven to have been committed anywhere within the jurisdiction of the court, at least anywhere within the division.

McDonough vs. U. S., 299 Fed. 30.

Moreover, the judgment here being for one year's imprisonment, would necessarily rest on the second count in which there is properly charged a nuisance.

II.

Alleged deficiencies in the affidavit supporting the information are not available here.

Certain strictures are made as to the form of the affidavit made by the Revenue Agents in support of the information. We are unable to see that the documents were at all questionable. Evidently a printed form was used covering more than one situation, thus resulting in there remaining unused portions of a blank, but the affidavit did expressly declare a sufficient fact to support the count as to which it was directed.

But in any event an insufficiency of the affidavit is of no importance, except in testing the legality of an arrest. A defendant going to trial upon an information without objection that it was not properly verified waives the point. A trial and conviction may be had on an information without verification.

Wagner vs. U. S., 3 F. (2d) 864

Farinelli vs. U. S., 297 Fed. 198

Jordan vs. U. S., 299 Fed. 298

Schmidt vs. U. S., 2 F. 2d, 367.

III.

It cannot be seen that the court erred in ruling, or that it even ruled on any motion to suppress evidence.

A section of the defendant's brief is devoted to showing that there was an unlawful search when the officers raided the defendant's premises and seized the stills. But this contention finds no basis in the record. The only print of any copy of search warrant or affidavit in the transcript appears as a portion of the assignments of error. (Tr. p. 19). It does not appear in any bill of exceptions in any form (Tr. pp. 26-47). Of course, in such a situation the matter cannot be reviewed. The assignments of error would not constitute a part of the record.

Feigin vs. U. S., 279 Fed. 107, 108.

It is not a case of waiving a lack of objection or exception. It is simply the case of the matter not being before the court in any form.

Allis vs. U. S., 155 U. S. 117, 39 L. ed. 91.

And it is very clear that even if the search warrant were invalid, the seizure and arrest of defendant could have been sustained from what the officers saw through the open doorway when they detected two going stills, the defendant standing by.

Vachina vs. U. S., 283 Fed. 35

Garske vs. U. S., 1 F. 2d, 620.

The officers saw without the room sufficient to enter and seize the property and make an arrest.

Forni vs. U. S., 3 F. 2d, 354.

Referring to the latter authority, it may be noted that it has been recently cited with approval by the Supreme Court of the United States in the case of

Steele, 45 Sup. Ct. Rep. 414.

IV.

The court did not err in permitting the information to be amended by the filing of a second count.

This matter would be within the discretion of the court and it would be manifestly the proper exercise of discretion rather than to take the time of the court to give a separate trial on a nuisance count which

could well have been filed. The testimony would have been the same and there were manifest reasons why the both counts should be tried simultaneously. While the defendant apparently objected, yet he gave no reasons why it would not be the proper exercise of the court's discretion to permit the filing of the second count. He did not show that it was necessary for him to secure other testimony, nor did he show any fact that would indicate that he was not as ready to try the nuisance count as he was the possession count.

That such action of the court under the circumstances would not be an abuse of discretion is supported by the authorities:

Muncy vs. U. S., 289 Fed. 780

Coates vs. U. S., 290 Fed. 134.

V.

The jury could have inferred from the facts that the maintenance of the nuisance was in a measure continuing.

Some contention seems to be made that it was not shown that the premises were maintained where manufacture of liquor was carried on, but the mere fact that the stills were set up and going would in a measure indicate more or less continuity and it was shown that the defendant's wife said in his presence that he had been operating nearly four years (Tr. p.

40). If proof of a single sale on a specified premises would be sufficient to show that there was a nuisance, clearly the testimony here would have that effect.

VI.

The judgment was not incorrect as to form.

It is complained that the judgment does not state on which of the offenses it was imposed; that is to say, it was single without reference to either count.

In the first place it must necessarily be referred to the nuisance count, but, if it were otherwise, the particular form of sentence would be sustainable under the decision in the case of

Feigin vs. U. S., 3 Fed. 2d, 866.

VII.

No point can arise on the court's charge to the jury.

Since there was no objection to the court's charge to the jury and since there were no instructions requested by defendant and since of course there could be no exception taken to any ruling, the defendant cannot now assign error to the charge or in effect make his objections for the first time on appeal.

Allis vs. U. S., 155 U. S. 117, 39 L. Ed. 91.

CONCLUSION.

Accordingly, it is submitted that all the contentions of defendant are shown to be groundless. His appeal has little merit. The judgment should be affirmed.

Respectfully submitted,

STERLING CARR,
United States Attorney,

T. J. SHERIDAN,
Asst. United States Attorney.
Attorneys for Defendant in Error.